TING UNG TUANG

v.

LAU TIONG IK CONSTRUCTION SDN BHD

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-40-2000]
20 MARCH 2001

CIVIL PROCEDURE: *Stay of proceedings - Application for stay in a pending cause or matter - Whether mode of commencement by way of originating summons improper - Rules of the High Court 1980, O. 12 r. 7, O. 19 r. 2*

CIVIL PROCEDURE: *Mode of commencement - Application for stay in a pending cause or matter - Proper mode of commencement - Whether by way of summons in chambers - Rules of the High Court 1980, O. 12 r. 7*

CIVIL PROCEDURE: *Judgment - Draft judgment - Whether plaintiff required to send draft judgment to defendant*

CIVIL PROCEDURE: *Judgment - Default of defence - Whether plaintiff entitled to enter judgment in default of defence - Judgment entered despite defendant's application for stay of proceedings - Whether an abuse of process - Whether application for stay by way of originating summons constituted a fresh action - Whether defendant's conditional appearance rendered unconditional - Rules of the High Court 1980, O. 12 r. 7, O. 19 rr. 2, 19*

The plaintiff commenced an action against the defendant for non-payment of extension work on a hotel that he undertook as a sub-contractor for the defendant. The contract between the parties was subject to an arbitration clause which required the parties to refer any dispute between them to arbitration. The defendant then applied for leave to enter conditional appearance to enable it to refer its alleged dispute with the plaintiff for arbitration. Upon leave being granted, the defendant commenced a fresh action by way of an originating summons for a stay under s. 6 of the Arbitration Act 1952. The plaintiff then sent a notice to the defendant pursuant to r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 informing the defendant that judgment in default would be entered against the defendant unless a defence was served. The defendant did not serve its defence and the plaintiff proceeded to enter judgment in default of defence against the defendant under O. 19 r. 2 Rules of the High Court 1980 ('RHC').

The defendant now applied to set aside the default judgment on the basis that it was irregular. It gave two reasons for its irregularity: (1) that the plaintiff had not sent a draft judgment for approval to the defendant before entering judgment; and (2) that it was an abuse of process as the plaintiff had persisted in entering the judgment despite his knowledge that the defendant wished to refer the dispute to arbitration and had applied for a stay of these proceedings for that purpose.

Held:

[1] Where the plaintiff's claim is for liquidated demand and a defendant fails to deliver his defence thereto, the plaintiff becomes entitled by virtue of O. 19 r. 2(1) RHC to enter final judgment for the amount so claimed. In *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd*, the Supreme Court identified a judgment in default of defence under O. 19 r. 3 as a judgment which needs only to be drawn up and presented for entry in the cause book without any need for a draft having to be filed for approval first. Although the Supreme Court dealt with a case concerning a default judgment under O. 19 r. 3 for unliquidated damages, what was stated therein would apply with equal force to a situation under O. 19 r. 2. Therefore, there is no need for a plaintiff who wishes to enter judgment in default of defence to first send to the defendant a draft judgment for approval.

[2] With regard to the defendant's submission that as a matter of policy the court should rule that in a default situation a plaintiff must send a draft judgment to the solicitors acting for a defendant so as to alert counsel who is sleeping on the file to do something, the short answer to that submission is that policy considerations are more than met by the rule of etiquette found in r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 which require a solicitor acting for a party to give the solicitor acting for the other party 48 hours' notice before entering judgment in default.

[3] From the facts, the plaintiff had not abused the process of the court. The unfortunate position in which the defendant found itself in was entirely of its own making. It had obtained leave to enter conditional appearance and it was for the defendant to preserve that conditional appearance by applying under O. 12 r. 7 RHC by way of a summons in chambers as it was an application in a pending cause or matter wherein a writ had already been issued and served. Instead, the defendant commenced a fresh action by way of an originating summons in which it sought to stay these proceedings in that action. As a consequence thereof, there was nothing on file to show that the defendant had, within 14 days of filing its

conditional appearance applied to set aside or stay these proceedings by reason whereof its conditional appearance became unconditional, leaving open for the plaintiff to enter judgment in default of defence against it.

[4] The defendant was precluded from relying on the ground that it had a defence on the merits as it did not rely on that ground to set aside the default judgment. Even if it could be argued that the court was obliged to consider what the defendant had said in its affidavit about a possible defence, the defendant did not discharge its onus that it had an arguable defence.

[5] The judgment having been obtained in accordance with the rules was regular. By virtue of O. 19 r. 9 RHC, there was no basis on which the court could exercise its discretion to set aside the judgment which had been regularly obtained.

[Application dismissed.]

Case(s) referred to:

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 ***(refd)***

Kewangan Bersatu Bhd v. Yap Ah Yit & Ors [1999] 1 CLJ 429 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

Rules of the High Court 1980, O. 1 r. 4, O. 5 rr. 1, 3, O. 12 rr. 6, 7(1), (2), O. 19 rr. 2(1), 3, 9, O. 42 rr. 8(1), 10(4), (5)

Sarawak Advocates (Practice and Etiquette) Rules 1988, r. 56

For the plaintiff - Wong Ho Leng; M/s Wong Ho Leng & Co
For the defendant - Paul Liong; M/s Liong & Co

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:

I had earlier dismissed the defendant's application to set aside a judgment in default of defence entered against it on 7 August 2000. I now give my reasons for doing so.

The defendant engaged the plaintiff as a sub-contractor to execute certain mechanical and electrical installation works (hereafter 'the works') for the extension to the Premier Hotel at Sibu, Sarawak. The plaintiff's appointment as sub-contractor is evidenced by a letter of acceptance dated 3 January 1997, which states, *inter alia*, that "the conditions of main contract wherever

applicable shall form part of the sub-contract documents." The general conditions of the main contract contain an arbitration clause (numbered 34) which requires the parties to refer any dispute or difference that may arise between them to arbitration in accordance with the terms stated therein.

In the course of undertaking the works, the plaintiff made claims for interim payment in the sum of RM393,439.38 for works done by way of progress claims but was not paid the same by reason whereof he commenced these proceedings on 14 April 2000.

On being served with the writ and statement of claim, the defendant took the view, *inter alia*, that it was not in breach of the terms of the sub-contract agreement and that a dispute had arisen between it and the plaintiff which it was entitled to refer to arbitration, pursuant to cl. 34 of the general conditions of contract.

Accordingly, on 14 June 2000, the defendant applied under O. 12 r. 6 Rules of the High Court 1980 (the 'RHC') for the following order:

> That leave be granted to file Conditional Appearance without prejudice to an application for an order that all further proceedings in this action be stayed pursuant to Section 6 of the Arbitration Act 1952.

The senior assistant registrar duly granted leave to the defendant in the terms sought for. On 19 June 2000, the solicitors who were then acting for the defendant informed the plaintiff's solicitors by letter about the defendant's application for leave to enter conditional appearance.

On 23 June 2000, the defendant entered a conditional appearance in this action and the memorandum it filed reads as follows:

> Enter conditional appearance for Lau Tiong Ik Construction Sdn. Bhd. (Company Co. 35382-T) without prejudice to an application for an order to set aside the writ.

The memorandum also bears an endorsement in the following terms:

> This appearance is to stand as unconditional unless the defendant applies within 14 days to set aside the writ or service thereof, and obtains an order to that effect.

I pause here to make the following observations. Although the defendant had applied for leave to enter conditional appearance so that it could apply for a stay of these proceedings to enable it to refer its alleged dispute with the plaintiff to arbitration, the memorandum of conditional appearance it filed states that the purpose for such an appearance was to apply to set aside the writ. The affidavit filed by the defendant in support of its application does not contain an explanation for the disparity.

It should next be noted that when a defendant has been granted leave to enter conditional appearance and had done so, to preserve the conditionality of that appearance, he must proceed in accordance with O. 12 r. 7 RHC. Sub-rule (1) thereof requires that a defendant must within 14 days of entering conditional appearance, apply to the court for an order setting aside the writ or service thereof, or notice of the writ, or apply for the other declaration mentioned therein. Sub-rule (2) then prescribes the mode of making such an application, and is in the following terms:

> An application under this rule must be made by summons.

Now, the RHC makes a distinction between a summons in chambers and originating summons. Order 1 r. 4 defines an originating summons to mean "every summons other than a summons in a pending cause or matter". Order 5 RHC regulates the mode of beginning civil proceedings in the High Court and by r. 1 provides that "subject to the provisions of any written law and these rules", civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. Order 5 r. 3 goes on to state that proceedings may be begun by originating summons but expressly provides that the rule does not apply to an application made in pending proceedings. By virtue of the fact that the writ herein had already been issued and served, it constituted a "pending cause or matter" within the definition set out in O. 1 r. 4. Therefore, if O. 12 r. 7 and the above rules are to be complied with, as the defendant wished to either obtain a stay or set aside a writ in a pending cause or matter, it needed to apply by way of a summons in chambers in these proceedings to do so.

Reverting to the facts, instead of applying by way of a summons in chambers in these proceedings as indicated above, the defendant on 4 July 2000 commenced a fresh action by filing an originating summons, which was numbered 24-87-2000, applying for a stay in the fresh action, of these proceedings, under s. 6 of the Arbitration Act 1952. There is again, no explanation from the defendant as to why it chose to proceed in this way.

The consequence of the defendant commencing a fresh action instead of applying in these proceedings to either stay or set the same aside, is this: there was nothing on file to show that the defendant had, within 14 days of the filing of its conditional appearance, applied to set aside or stay these proceedings by reason whereof its conditional appearance had become unconditional thereby leaving open the way for the plaintiff to enter judgment in default of defence against it unless it served a defence on the plaintiff. That explains why, on 11 July 2000, the solicitors for the plaintiff sent a notice pursuant to r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 to the solicitors for the defendant informing them that unless a defence was

served on behalf of the defendant in this action, judgment in default would be entered against the defendant.

The defendant did not serve or file a defence in response to the notice sent to it by the plaintiff's solicitors as it did not want to be seen as having "taken a step" in the proceedings, which, according to the defendant, would have prejudiced its application to stay these proceedings.

In the absence of a defence having been served or filed in this action, the plaintiff on 7 August 2000, entered judgment in default of defence against the defendant under O. 19 r. 2 RHC whereafter a copy of the judgment was served on the defendant's solicitors. On 18 August 2000, the defendant filed this application to set aside the said judgment.

In applying to set aside the default judgment herein, the defendant relies only on one ground, namely, that the judgment is irregular and must, therefore, be set aside *ex debito justitiae*. Counsel for the defendant gave two reasons for saying that the judgment was irregular: (a) the plaintiff's solicitors had not sent to the defendant's solicitors a draft judgment for approval before the judgment in default was entered. In support of this proposition, counsel cited *Kewangan Bersatu Bhd. v. Yap Ah Yit & Ors.* [1999] 1 CLJ 429; and (b) the judgment had been obtained as a result of an abuse of process, in that, the plaintiff had persisted in entering judgment despite his knowledge that the defendant wished to refer the dispute to arbitration and had applied for a stay of these proceedings for that purpose.

I now consider each of the defendant's contentions and begin by asking: in a case such as this, where the plaintiff's claim against a defendant is for a liquidated demand only, and that plaintiff has duly warned the solicitors acting for the defendant that judgment in default will be entered against the defendant if he does not file a defence, but whose warning is ignored; is such a plaintiff required to first send to the defendant's solicitors a draft judgment for the latter's approval before entering judgment against the defendant?

According to counsel for the defendant, O. 42 r. 8(1) RHC imposes on the plaintiff a statutory obligation to do so; failure to comply therewith renders the judgment irregular and liable to be set aside *ex debito justitiae*. In support, the case of *Kewangan Bersatu Bhd. v. Yap Ah Yit (supra)* was cited.

Counsel for the defendant also submitted that there are good reasons of policy, for requiring a plaintiff to send a draft judgment to solicitors acting for a defaulting defendant – it would "give further notice and alert counsel who is sleeping on the file to do something" so that court's time and expenses would not be wasted in having to deal with an application to set aside any judgment that may have been so obtained.

I regret I do not agree with either of the above contentions.

Where the plaintiff's claim is for a liquidated demand only, and a defendant fails to deliver his defence thereto, the plaintiff becomes entitled, by the provisions of O. 19 r. 2(1) RHC, to "enter" final judgment for the amount claimed. And so, it might be asked: how does the plaintiff go about "entering" that final judgment, and, is he required to first draw up a draft judgment before doing so? If he is not required to do so, then obviously there would be no need to send a draft copy to the defendant's solicitors for approval. Those questions have been authoritatively answered by the Supreme Court in the case of *Hasil Bumi Perumahan Sdn. Bhd. & Ors. v. United Malayan Banking Corp. Bhd.* [1994] 1 CLJ 329. In that case, the appellant had served its statement of claim on the respondent who appeared but did not serve a defence within the time allowed by the rules. The solicitors for the appellant then served on the respondent's solicitors the usual 48 hours' notice requiring a defence to be served. The respondent's solicitors sought an extension of three weeks to do so but nevertheless filed a defence on 26 March 1991 (but outside the 48 hours). Some three weeks later, on 19 April 1991, the appellant entered judgment in default of defence against the respondent but the judgment itself was backdated by the senior assistant registrar (the 'SAR') to 23 March 1991. The reason for the backdating was this: the appellant had filed a draft judgment for approval of the SAR on 23 March 1991; once approved, the appellant then prepared a fair judgment and presented it for entry at the registry on 19 April 1991, but the SAR backdated the judgment to 23 March 1991, being the date when the draft judgment was first filed for approval. On appeal to the judge, it was held that the SAR was wrong to backdate the judgment to 23 March 1991. Its proper date should have been 19 April 1991 when it was presented for entry at the registry, but, as by that date a defence had already been filed and served, the judgment should not have been entered at all.

The appellant appealed to the Supreme Court. The issue before the court was whether the judgment dated 23 March 1991, but which had been presented for entry at the registry only on 19 April 1991, was, an irregular judgment and thereby liable to be set aside. The appellant contended that the date when the draft judgment was filed for approval was the date when it was "entered" because according to counsel, O. 42 r. 10(4) and (5) made it clear that an order had to be "drawn up" before being "entered" – "drawing up" being the physical preparation of the draft order and "entering" being the filing of the draft order. To resolve the issue before it, it became necessary for the Supreme Court to consider what constituted "entering" a judgment and whether a draft judgment needed to be filed in a default situation.

In dismissing the appeal, this is what his Lordship Jemuri Serjan CJ (Borneo) who was speaking for the Supreme Court said (at p. 319):

> In our view, in a case under O. 19 r. 3, as is the case in this appeal, there is no statutory obligation on the part of the solicitors for the appellant to file a draft judgment which is required only in a case under O. 42 r. 8. What was done here was *ex abundanti cautela*. The relevant rule applicable in the instant case is r. 10(1), (2) and (3). The solicitors for the appellants need only to draw up the judgment under r. 10(2) and present it to the senior assistant registrar for entry and, under r. 10(1), the senior assistant registrar should enter it in the cause book kept for that purpose.

Quite clearly then, the Supreme Court distinguished between judgments and orders which need to be drawn up in draft first pursuant to O. 42 r. 8, and judgments which only need to be drawn up and presented at the registry for entry in the cause book. The Supreme Court identified a judgment in default of defence (under O. 19 r. 3) as a judgment which needs only to be drawn up and presented for entry, without any need for a draft having to be filed for approval first.

Although the Supreme Court was there dealing with a case concerning a default judgment under O. 19 r. 3 (for unliquidated damages), what was stated, in that case would apply with equal force to a situation under O. 19 r. 2 because whether a plaintiff's claim is for a liquidated demand only or for unliquidated damages, in both instances, once a defendant makes default in serving a defence, the plaintiff becomes entitled to "enter" final judgment (under O. 19 r. 2) or interlocutory judgment (under O. 19 r. 3) and whether it is a final as opposed to a interlocutory judgment that is being "entered", the procedural steps to do so remain the same – and what these procedural steps are have been stated by the Supreme Court. I gratefully follow and give effect to it. The question I had first posed must, therefore, be answered in the negative: there is no need for a plaintiff who wishes to enter judgment in default of defence, to first send to the solicitors acting for that defendant a draft judgment for approval, before doing so.

In *Kewangan Bersatu Bhd. v. Yap Ah Yit & Ors. (supra)*, the learned judge refused to follow the decision of the Supreme Court in *Hasil Bumi Perumahan Sdn. Bhd. & 2 Ors. v. United Malayan Banking Corp. Bhd.* and instead distinguished it on the grounds stated by him. For the reasons I have already given, I respectfully decline to take that course.

With regard to the submission of counsel for the defendant that as a matter of policy, I should rule that in a default situation, a plaintiff must send a draft judgment to solicitors acting for a defendant so as to alert counsel who is "sleeping on the file to do something", the short answer to that submission is

that the policy considerations are more than met by the rule of etiquette found in r. 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 which requires a solicitor acting for a party to give the solicitor acting for the other party 48 hours' notice before entering judgment in default.

I next consider whether the judgment in default had been obtained as a result of an abuse of process, as alleged by the defendant.

From the facts before the court, it cannot be said that the plaintiff had abused the process of court. The unfortunate position in which the defendant finds itself in is entirely of its own making. It had obtained leave to enter a conditional appearance and did do so; thereafter it was for, the defendant to take such steps as was necessary to preserve the conditionality of its appearance by making, in these proceedings, the application it intended to make in accordance with O. 12 r. 7 RHC. Instead of doing so, the defendant commenced a fresh action by way of an originating summons in which it sought to stay these proceedings in that action. I have looked for an explanation in the affidavits filed by the defendant as to why the defendant had allowed its conditional appearance to become unconditional and why it was necessary for the defendant to commence a fresh action to apply for a stay of these proceedings, but have found none. I do realise that the defendant has in para. 3 of the affidavit affirmed by Law Choon King explained that it did not file a defence as it did not want to be seen as having taken a step in these proceedings, thereby jeopardising its application to refer the dispute to arbitration. However, that only explains why no defence was filed: it does not explain why it allowed its conditional appearance to become unconditional or why it commenced a fresh action by way of its originating summons. During submissions, counsel for the defendant did venture an explanation from the Bar table. He indicated that the lawyer who was formerly handling the defendant's case was faced with a dilemma – he (the former lawyer) had taken the view that a person entering a conditional appearance can only apply to set aside the writ or service thereof or challenge the jurisdiction of the court but cannot, because of the way O. 12 r. 7 is worded, apply for a stay of proceedings. Now, if that was the reason why the defendant had allowed its conditional appearance to become unconditional and also why it had filed its originating summons, then the lawyer who had so decided or at least the defendant's representative should have given that explanation in an affidavit instead of the explanation being given through counsel in chambers or in written submissions which I cannot accept or act on.

If it is of any assistance to counsel, the dilemma faced by the defendant could have been avoided if an application had been filed to either stay these proceedings or set aside the same on the grounds that the court did not have jurisdiction in view of the agreement to arbitrate. In that way, if the plaintiff took objection to the application on the ground anticipated by the defendant's former lawyer, arguments could have been presented to the court on the true scope purpose and ambit of a conditional appearance under O. 12 r. 6 and 7 RHC and then left it to the court to decide on the issue. But the defendant has decided for itself what the law is and has committed itself to a course by which it is now bound.

In the circumstances, I find that it does not lie in the mouth of the defendant to accuse the plaintiff of having obtained his judgment through an abuse of process: there was, in my view, none.

The judgment herein having been obtained in accordance with the rules, it is regular. The court is, by O. 19 r. 9 RHC, vested with a discretion to set aside such a judgment but for that discretion to be exercised in favour of the defendant, it would need to (i) offer a reasonable explanation as to why it allowed judgment to be entered against it, and even more importantly, (ii) demonstrate that it had a defence on the merits. As to (i) above, the defendant has explained why it did not file a defence but it should be realised that a defence need not have been filed in the first place if the defendant had, in accordance with the leave granted to it, filed in these proceedings, its intended application (whatever it was) to preserve the conditionality of its appearance. However, there is no explanation on this crucial point of why it did not do so. Without an explanation, there is no material upon which discretion can be exercised in favour of the defendant. As to (ii) above, it is not a ground of the defendant's application in applying to set aside this judgment that it has a defence on the merits. Counsel for the plaintiff has submitted that it would be wrong to allow the defendant to now rely on this ground in submissions because if the defendant had raised it as a ground in its application, the plaintiff would have addressed the issue in the plaintiff's affidavit in opposition which he has not done as it was never relied on by the defendant as a ground. I find merit in this submission. The defendant not having relied on it as a ground in bringing this application, it is precluded from taking this point in submissions.

Even if it can be argued that I am obliged to consider what the defendant has said in its affidavit about a possible defence, I find the defendant has not discharged the onus on it of demonstrating that it has an arguable defence. The defendant has in a cursory and off-handed manner "pointed out" in para. 3 of its affidavit that the plaintiff's claim is invalid because his claims for

interim progress payments were not certified by both the architect and defendant as required by cl. 30 of the general conditions of contract. During submissions, counsel did not request me to look at cl. 30 of the general conditions of contract. If he had done so, he would have found it consisted of eight sub-clauses, each with its own sub-sub-clauses. In my judgment, the court is not obliged to sift through the various sub-clauses and sub-sub-clauses which make up cl. 30 to first decide which of them the defendant seeks to rely on as affording it a defence and then go on, to try to see for myself why it would afford a defence to the plaintiff's claim: that is for the defendant to do so that the court may decide whether or not what is relied upon does in fact raise an arguable defence.

Counsel for the defendant did, however, say that the whole dispute between the plaintiff and the defendant is laid out in "exh. L5" to Law Choon King's affidavit. When that exhibit is looked at, it consists of two documents, both of which relate to the defendant's claim for liquidated and ascertained damages against the plaintiff for alleged late completion of the works, but there is not a word in this exhibit about the alleged defence of non-certification of progress payments which the defendant intends to rely on by way of defence. In the result, the defendant had not demonstrated that it had an arguable defence.

In the premises, there was no basis on which I could exercise discretion to set aside the judgment which had been regularly obtained. In the event, I dismissed the defendant's application with costs.